No. 94-1941 and 94-2107

IN THE

Supreme Court of the United States

October Term, 1995

UNITED STATES OF AMERICA,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
For the Fourth Circuit

BRIEF AMICI CURIAE OF
THE CENTER FOR MILITARY READINESS,
FAMILY RESEARCH COUNCIL,
THE MINNESOTA FAMILY COUNCIL,
CONCERNED WOMEN FOR AMERICA,
THE RUTHERFORD PROJECT, EAGLE FORUM,
THE CONGRESS FOUNDATION AND
THE SOUTHEAST LEGAL CENTER
IN SUPPORT OF RESPONDENT
COMMONWEALTH OF VIRGINIA

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INTEREST OF AMICI

Amici are educational groups concerned about the impact of strict scrutiny for sex classifications on military readiness and family law. Amici support the Commonwealth of Virginia and VMI in this case.

SUMMARY OF THE ARGUMENT

This Court should reject the Government's aside that it use this case to break new constitutional ground and declare sex a suspect class. For the past twenty years, this Court has applied a "carefully developed" intermediate standard of review to sex-based classifications. *Michael M. v. Sonoma County Superior Court,* 450 U.S. 464, 489 n.2 (1981) (Brennan, J., dissenting). This Court always has recognized that race and sex are different and, therefore, that they pose different questions under the Equal Protection Clause. This is because, unlike sex-based classifications, "racial classifications by government always violate the Constitution, for the simple reason that, so far as the Constitution is concerned, people of different races are always similarly situated." *Michael M.,* 450 U.S. at 477. In short, race and sex have not been, and should not be, treated the same under the Constitution for the simple reason that race and sex are not the same. *Id.* at 477-78. Thus, the more rigid approach that inheres in strict scrutiny not only is not required by the Constitution for sex-based classifications, it is not appropriate. Besides the gaping holes in logic and lack of legal portfolio for the Government's theory on "strict scrutiny," twenty years after it first fashioned intermediate scrutiny, and more than a decade after the nation as a whole rejected strict scrutiny for sex classifications by rejecting the federal ERA, it frankly would be unseemly for this Court to surmise today that the Constitution requires a stricter

standard.

Indeed, even in this case the Government does not criticize the intermediate test as unworkable, defective, or a failure in protecting certain groups, in any way. The potential mischief in any attempt strictly to equate sex and race, or the sexes, is seen in its impact on judicial deference to military policy choices and in larger questions now reserved to the States.

ARGUMENT

I. The impact of strict scrutiny for sex-based classifications on military policy choices counsels strongly against eliminating the well-established standard of intermediate scrutiny.

Today the United States asks this Court to break new constitutional ground. It appeals strongly for the right to subject legislative classifications based on sex to the law's strictest scrutiny.

This Court repeatedly has emphasized that separation of powers concerns militate against the creation of new protected classes.[1] *City of Cleburne v. Cleburne Living Center,* 473 U.S. 432, 441-42 (1985). This caution particularly is apt when the classification arises in the military setting. *See, e.g., Brown v. Glines,* 444 U.S. 348, 354-55 (1980), *Weiss*

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[1] This Court repeatedly has refused to create new suspect classes. *See, e.g., Massachusetts Bd. of Retirement v. Murgia,* 427 U.S. 307, 313 (1976) (elderly); *Cleburne,* 473 U.S. at 442 (mentally retarded); *Lyng v. Castillo,* 477 U.S. 635, 638 (1986) ("close relatives"); *Bowen v. Gilliard,* 483 U.S. 587, 601-03 (1987) ("families"); *Johnson v. Robison,* 415 U.S. 361, 375 n.14 (1974) (conscientious objectors).

v. United States, 114 S. Ct. 752 (1994). It is well-settled that judicial deference---that is, deference in addition to the deference that inheres in the rational basis test itself--- "is at its apogee when reviewing congressional decision-making in [the military context]." *Id.* at 760-61. Indeed, it is Congress, not the Judicial Branch, that has the explicit and exclusive constitutional prerogative to "raise and support Armies [and to] make Rules for the Government and Regulation of the land and naval forces." Article I, section 8, UNITED STATES CONSTITUTION.

Thus, the judiciary always has accorded great deference to military decisions, on the separation of powers ground, that "ultimate responsibility for [the armed forces] is appropriately vested in branches of the government which are periodically subject to electoral accountability." *Gilligan v. Morgan,* 413 U.S. 1, 10 (1973).

The matters underlying the judicial principle of deference to military policy choices, then, are too weighty to be disposed of by a footnote, as the Government attempts to do. Br. for Pet. at n.23. The plain reality is that the Government's invitation to impose strict scrutiny on sex-based classifications will---indeed, philosophically, *must*---affect both the judiciary's role in military policy-making and, ultimately, military policy.[2] It cannot be gainsaid that the Government today asks this Court to take a big step, that of

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[2] Although the Government relies on its steadfast contention that the instant case is not a military case, Br. for Pet. at n.23, that contention is quite beside the point. What the Court decides today immediately will affect policy and policy debates within the armed forces. *See, e.g., Baker v. United States, infra* note 6 (discussing application of strict scrutiny of sex-based classifications to a "reverse discrimination" claim brought by male colonels and pending in the United States Court of Federal Claims).

creating a new suspect classification subject to strict scrutiny. As always, but especially here where this new standard would implicate strongly a venue committed wholly to a coordinate branch of government, it is imperative to look hard before one leaps.

A. The impact of strict scrutiny on military policy choices

Plainly, as detailed below, the principle of strict scrutiny, applied to sex-based classifications, is in tension---if not outright conflict---with judicial deference to military decisions. These policies reflect, what might be called in the vernacular, the facts of life. And how society arranges itself in regard to those facts, to a large degree, reflects social consensus, arrived at through the constantly fine-tuned social contract that is the object of democracy. For example, the Government cites privacy considerations that are furthered by providing separate quarters and bathroom facilities for men and women. It then states, in conclusory fashion, this separate treatment furthers compelling governmental interests. Br. for Pet. at n.25.

The Government's conclusion regarding its compelling interests in individual privacy may have merit, but it is at least untried.[3] Moreover, the fact the Government felt

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[3] If the Government does have a compelling interest in how society arranges itself in regard to cognizable differences between men and women, the Government's charter goes back to that social consensus, not to the Constitution. Plainly, the question of whether it is appropriate to provide "separate arrangements for men and women while sleeping and while using bathroom and shower facilities" is a quintessential social question based on the fact there exist cognizable differences between men and women that do not exist between members of various races. If the social consensus changed tomorrow---and under this new contract "gender privacy" was deemed a social evil---the Government's claim to a

compelled to style separate quarters for men and women as furthering a compelling governmental interest itself demonstrates that matters of general social consensus must be revisited if strict scrutiny is applied to sex-based classifications.

Indeed, the government's own analysis proves why it asks too much when it invites this Court to apply strict scrutiny to policy choices that reflect distinctions based on sex. What the government gives, it immediately takes away.

The entire practical and analytical problem posed by ratcheting sex-based classifications up to strict scrutiny is encapsulated in footnote 25 of the Government's brief:

> Strict scrutiny of . . . classifications based on sex will not necessarily be "fatal in fact." For example, where discrimination persists, "government is not disqualified from acting in response to it." *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097, 2117 (1995). The compelling interest in respecting individuals' privacy would clearly justify separate arrangements for men and women while sleeping and while using bathroom and shower

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compelling government interest in separate showers for men and women might ring hollow. *See, e.g.*, Wendy Shalit, A Ladies' Room of One's Own, Commentary at 33 (Aug. 1995). The point is not whether the policy-maker might show a compelling reason for differentiating between men and women in any given factual setting. Rather, the point is that strict scrutiny would *require* such a reason in *every* setting, and that requirement is unwarranted, both because the underlying distinctions are rational more often than not and because the Constitution leaves these common sense matters---and the right to change their collective mind regarding them---to the people.

facilities. Br. for Pet. at n.25.

Clearly, the Government seeks a rule that sows the seeds of its own destruction. To work, the law would be required to keep in perfect tension, much like juggling four pins in the air at all times, at least these tenets:

- Because distinctions between men and women are irrational *per se*, strict scrutiny is required for policy choices that reflect distinctions between men and women.[4]

- Moreover, strict scrutiny requires *individualized* scrutiny. That is, policies that reflect distinctions between men and women fail strict scrutiny, for example, if one woman does not conform to the characteristics of the class as a whole.[5]

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[4] Br. for Pet., *e.g.*, at 44-45.

[5] *Id.* Plainly, the rule of law presupposes the creation of categories. *See, e.g., Massachusetts Bd. of Retirement*, 427 U.S. at 314. *Imposition of strict scrutiny, however, presupposes the relevant category is illicit.* Therefore, it is incumbent on the policy-maker to make wholly individualized determinations regarding members of the class for whom classifications are strictly scrutinized. In other words, as the Government argues, Br. for Pet. at 44-45, it would be impermissible ever to make policy choices based, *e.g.*, on the fact that "job related physical requirements would necessarily exclude the vast majority of women Service members." Note 20 and accompanying text, *infra*. Indeed, the Government argues that VMI's admission policy fails strict scrutiny because:

> [The lower] court . . . did not purport to find---nor could [it] possibly have found---that *all* women are less aggressive or less confident than *all* men, or that VMI's program was educationally inappropriate for *all* women. . . . The court . . . approved the VWIL program on the premise that *average* psychological and sociological

- But, if the Government determines that "discrimination persists," the Government can impose sex-based policies (such as affirmative action) to respond to that discrimination, and, moreover, to respond to it on a class-wide basis without regard to the merit of any individual in the favored or disfavored class.[6]

> differences between the sexes can justify denying *all* women admission to an educational program that some fully qualified women want to enter. . . . Women whose choices or abilities are different from those of the "typical" or "average" woman cannot be denied an important educational opportunity . . . solely because most women would not be inconvenienced by that limitation.

Br. for Pet. at 44-45 (original emphasis). Thus, even if the vast majority of women, for example, cannot meet standards for a particular position, the Government urges that policy-makers nevertheless are required by the Constitution to attempt to find that one woman who does meet standards (or, in point of fact, to "gender-norm" the standards) and then, regardless of cost to the organization, to accommodate her in that position. This elaborate "logic" has no analogue in questions regarding race-based classifications---precisely because this "logic" is without portfolio from the Equal Protection Clause. *Cf. Mathews v. Eldridge*, 424 U.S. 319, 332 (1976) (one factor in the due process analysis is "the Government's interest, including the *function involved* and the *fiscal and administrative burdens*" entailed in the policy choice) (emphasis added).

[6] *See, e.g., Baker v. United States* (No. 94-453C United States Court of Federal Claims). *Baker* was brought by 83 white male colonels who were selected by an administrative board for involuntary early retirement from the Air Force in 1992. The secretarial memorandum of instruction to the board required the board, upon completing its selections for involuntary retirement, to render a report concerning the selection rate for minorities and women. The board's report to the Secretary indicated the files of minority and female officers had received preferential treatment in determining which officers would be involuntarily retired and which would continue on active duty.

In its supplemental motion for summary judgment in *Baker*, the United

- And, finally, even though strict scrutiny is required

States informed the court in a footnote:

> The Government's November 16, 1995 brief in United States v. Commonwealth of Virginia, 94-1941 (U.S.), asserts that strict scrutiny should be applied to classifications that deny opportunities to individuals based upon their sex. In so doing, however, the Government's brief specifically distinguishes executive and legislative branch programs and policies having to do with the Federal Government's conduct and control of military affairs. As to military affairs, the Government's brief suggested that courts should continue to defer to executive and legislative branch judgments [citations omitted]. To the extent that our prior briefs argued that gender distinctions are subject, at most, to an intermediate level of judicial scrutiny * * * we withdraw that argument. As we have demonstrated, however, the military judgments implicated in this case deserve the judicial deference reflected in the above-cited cases, whatever level of scrutiny is applied.

Baker v. United States (No. 94-453C United States Court of Federal Claims) (Defendants' Supplemental Motion for Summary Judgment); *but cf.* note 9, *infra*.

Colonel Baker now argues, if strict scrutiny applies to sex-based classifications, first, such scrutiny is inconsistent with judicial deference to military policy choices and, secondly, his reverse discrimination claim now even is stronger since his selection for involuntary retirement was based, in part, on his sex.

This controversy is no small point, especially in light of the scope and magnitude of the various personnel decisions required to reduce the size of the United States armed forces from its Cold War high. *See, e.g.*, Karen Jowers, Women Have Been Treated Equally, Military Says, Air Force Times (Nov. 27, 1995) ("women have fared about the same as men in the reduction of the military forces during the drawdown, and sometimes better, military officials say. * * * In the Air National Guard . . . the number of women increased by two-tenths of a percentage point from fiscal 1993 to 1994, from 13.9 percent to 14.1 percent, although the Air Guard overall shrank by 3.1 percent during the period. * * * In the Marine Corps, 1.9 percent of the officers who were selected for [involuntary] retirement were women, even though women make up 3.6 percent of the Marine officer corps").

because distinctions between men and women are irrational *per se*, existing policy distinctions between men and women (such as separate quarters and bathroom and shower facilities) are permitted because the distinctions between men and women are compelling.[7]

It is not too strong to say, then, that what the Government urges is not strict scrutiny, as a controlling legal principle for reviewing sex-based policy choices, at all. Rather, it advocates simply for a larger constitutional writ to equalize various situations as it sees fit, not to provide equal protection under the law.

In essence, the Government advocates for a constitutional writ to impose strict scrutiny on policy choices that disfavor a favored group and to insulate from strict scrutiny policy choices that favor a favored group, upon no more principled basis than the notion of "it all depends on whose ox is being gored." But the real issue is whether the Constitution requires that the law must say that "what is good for the goose is good for the gander" *and mean it in every instance.*

The Government's view of "strict scrutiny" for sex-based classifications may regard a fashionable notion of "equalized" protection of the law, but it conforms nowhere to the Equal Protection Clause. At best, and this is not great, the practical result of the "strict scrutiny" urged by the Government is "intermediate scrutiny *plus*"---plus more lawsuits, plus more judicial intervention in the social contract, plus more confusion (if not plain incoherence) in the law. Either way, the outcome is not more beneficial, to either the regulated class or the law, than the flexibility to countenance common

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[7] Br. for Pet. at n.25.

sense distinctions between men and women that inheres in the present standard of review as intermediate scrutiny.

Indeed, it is *because* there exist legally and practically cognizable differences between men and women that, even as it urges this new standard of review, the Government attempts to attenuate the searching judicial inquiry that is part and parcel of strict scrutiny. It is counterintuitive to urge strict scrutiny---not only the highest standard of review known to the law, but, by its own philosophical design, a "hard and fast" rule---for policy choices based on sex, but then to argue that existing policy choices that reflect distinctions between men and women are supported by compelling governmental interests. This is a case where the proposed exceptions to the proposed rule prove the inadvisability of the rule in the first instance.

First, in this very case, the Government attempts to straddle the hard and fast view of strict scrutiny and the greater flexibility that inheres in intermediate review. It argues that the decision to exclude women from VMI fails strict scrutiny because distinctions between men and women are irrational *per se*. Br. for Pet., *e.g.*, at 44-46. But the Government also argues, once women are admitted to VMI, *based on distinctions between men and women*, the government has a compelling reason to "justify," for example, separate quarters and facilities for men and women. Br. for Pet. at n.25.

Likewise, unless the Government today urges a grand remodeling of society, not to mention the armed forces, the "strict scrutiny" advocated by the Government leaves policy-makers with much explaining to do. The Army's decision to

exclude women from certain military schools,[8] for example, hardly could withstand strict scrutiny since the application of that standard of review intrinsically concludes policy distinctions between men and women are irrational in the same way it is irrational to make distinctions between races. But, to follow the Government's reasoning, once women are admitted to those military schools, the distinctions between men and women that were irrational become so rational they give rise to compelling governmental interests that justify actually treating women differently than men.[9] Br. for Pet.

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[8] *See, e.g., Army Regulation* 611-201 at 13-15 (female soldiers may not attend the Infantry, Armor, or Special Forces School). Other schools or schooling may be closed to female soldiers based on the prerequisite of certain military occupational specialties. *See* note 11, *infra.*

[9] The Government is careful to concede only that "the phenomena of sex and race *discrimination* differ from each other in some important respects," all the while it claims *sex* and *race* are interchangeable for purposes of suspect classification. Br. for Pet. at 36; *see also* All-male VMI Faces Ruling: Supreme Court to Decide Whether the School Can Bar Women, Air Force Times (Oct. 23, 1995) ("[t]he Clinton administration says the only way to guarantee women equal treatment is to admit them to VMI. A separate 'women's VMI' begun this fall is as unlawful as segregated schools once created for blacks and whites, administration lawyers contend").

As the Government's theory in the instant case proves, however, the analogy between sex and race stops at the front gate. It would be grotesque to suggest the armed forces "clearly [could] justify separate arrangements for [blacks and whites] while sleeping and while using bathroom and shower facilities," yet just such a conclusion makes imminent good sense even to those advocating strict scrutiny for sex-based classifications. *See, e.g.,* Br. for Pet. at n.25; *cf.* Br. of *Amici* Cornum *et al.* at 14 ("[c]reating a separate barracks floor for women could maintain [VMI's adversative methodology] for men and impose the same [methodology] on the women vis-a-vis other women"); *see also, e.g., Rostker,* 453 U.S. 57; *Schlesinger v. Ballard,* 419 U.S. 498 (1975); *Michael M.,*(upholding sex-based classifications under intermediate

at n.25.

Under the rubric of strict scrutiny for sex-based classifications, this is the only reasoning---never mind that it is logically inconsistent and internally contradictory---that could allow the armed forces to continue to fashion sex-based distinctions that range from the sublime to the minute:

- to draft men and not women;[10]

- to involuntarily assign men, but not women, to direct combat positions;[11]

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scrutiny); *cf. also California Federal S. & L. Assn. v. Guerra,* 479 U.S. 464 (1981).

Why? Because sex and race have important and cognizable differences. Those differences, which all relate to cognizable differences *between members of the class based on sex,* render strict scrutiny workable for race-based classifications and unworkable for sex-based classifications.

[10] *See Rostker v. Goldberg,* 453 U.S. 57 (1981) (subjecting only men and not women to involuntary military service justified by the fact that only men were sent into direct combat); *Report of the Presidential Commission on the Assignment of Women in the Military [Commission]* (Aug. 28, 1992) at Findings 4.7-4.10 and 1.63 (Office of Secretary of Defense testimony was "women were not in combat in the Gulf War").

[11] The Army, for example, presently excludes female officers from the Armor, Infantry, and Special Forces branches. Army Regulation 611-201, *Military Occupational Classification and Structure* (1994) at 4. It also excludes enlisted women from 45 military occupational specialties, for example, 11C (Indirect Fire Infantryman), 11M (Heavy Antiarmor Weapons Infantryman), 12D (Engineer Tracked Vehicle Crewman), 13B (Multiple Launch Rocket System/Lance Operations/Fire Direction Specialist), 14B (Line of Sight-Forward-Heavy Crewmember), 18B (Special Forces Weapons Sergeant), 45D (Self-propelled Field Artillery Turret Mechanic), 45B (Bradley Fighting Vehicle System Turret Mechanic), and 63E (M1 ABRAMS Tank System Mechanic). *Army Regulation 611-201* at Table 4-1.

- to provide separate quarters and facilities for women;[12]

- to require women to run two miles in 18 minutes and 54 seconds and accomplish 50 sit-ups and 18 push-ups while men must run two miles in 15 minutes and 54 seconds and accomplish 52 sit-ups and push-ups;[13]

- to provide "non-chargeable" leave for mothers, but not fathers, after the birth of a child;[14]

- to permit women to curtail their enlistment at their request by reason of pregnancy while men have no comparable grounds to request to early discharge;[15]

- to find women fit for duty with up to ten percentage points more body fat than men;[16]

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[12] *See, e.g.*, note 20 and accompanying text, *infra*.

[13] Field Manual 21-20, *Army Physical Fitness Training* (1992) at Chapter 14; *see also, e.g.*, Jonathan T. Ullyot, A Lesson in Military History from The Citadel, Washington Times (Aug. 23, 1995) (women going through Officer Candidate School in the Marine Corps are provided special ramps to help them negotiate the obstacle course; men are required to march with their gear (increasing their rucksack weight by 30 pounds) while women march with empty rucksacks and their gear is trucked to the rifle range).

[14] Army Regulation 600-8-10, *Leaves and Passes* (1994) at 13.

[15] Army Regulation 635-200, *Enlisted Ranks Update* (1990) at 41-42 (pregnant soldiers granted discharge at their request).

[16] Army Regulation 600-9, *Army Weight Control Program* (1992) at 4. News reports on Nancy Mellette, a woman who intends to apply for

- to provide women with a military clothing allowance that is larger than that provided to men;[17]

- to permit women to have long hair while men must have short hair or shave their heads;[18]

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admission to The Citadel, record this colloquy between Mellette and a reporter: "Asked her weight, Mellette pluckily replied, *'Don't you know you're not supposed to ask women that question, sir?'*" Mellette Ready For Citadel, Associated Press (Sept. 6, 1995) (emphasis added).

[17] *See, e.g.*, Neff Hudson, Uniforms Cost More, But Allowances Rise, Air Force Times (Sept. 18, 1995) ("[the clothing] allowances vary for men and women because they have different clothing. Generally, women's uniforms are more expensive, so their allowances are bigger. . . . For male Air Force members, the initial clothing allowance will be $829.61 . . .. Female Air Force members will get an initial allowance of $1,017.93 . . . The Army's initial allowance for male enlisted members will be $958 in fiscal 1996 . . . for female soldiers, the initial allowance will be $1,171.16 . . . Again, enhanced [Battle Dress Uniforms] are the biggest change to the [clothing] list, although women also will get an improved neck tab that costs $4.25 more. Male Marines will get an initial allowance of $923.30 . . . Female Marines will get an initial allowance of $1,147.07").

[18] Army Regulation 670-1, *Wear and Appearance of Army Uniforms* (1992) at 12 (grooming policies for men and women). The role of cultural factors in different standards of appearance for men and women is amenable to intermediate but not strict scrutiny, as seen in recent events surrounding Shannon Faulkner's admission to The Citadel.

Upon obtaining court-ordered admission to The Citadel, Ms. Faulkner sought exemption from The Citadel's traditional "knob" haircut. "Buzz cut" next for Citadel's 1st woman, Detroit News (Aug. 11, 1994)("U.S. District Judge C. Weston Houck . . . said there was no reason to spare [Ms. Faulkner's] hair. 'In making this request for a different haircut, *the plaintiff is asking for unequal treatment.*' The school argued against any such special consideration. 'If the haircut is the first thing, what will be the next?' Citadel lawyer Dawes Cooke asked. 'What is the next thing Ms. Faulkner will find at The Citadel which is not appropriately feminine?'") (emphasis added).

- to allow women to wear earrings and make-up in uniform while men may not;[19]

Indeed, in his Memorandum dated January 13, 1994, then-Secretary of Defense Les Aspin directed the military services to "expand opportunities for women" with the "following restrictions on [their] assignment: where the Service Secretary attests that the costs of appropriate berthing and privacy arrangements are prohibitive * * * [and] where job related physical requirements would necessarily exclude the vast majority of women Service members."[20]

The Department of Justice asked the district court to reconsider allowing The Citadel to shave Ms. Faulkner's head, claiming the school was proceeding "under *the guise of gender-neutral grooming policies* [that] implement rules which altogether denigrate Ms. Faulkner's *identity as a woman*." The Citadel responded that "[t]he Justice Department motion 'points up some of the paradoxes at work here. On the one hand they espouse the position there are no significant cultural differences between men and women that would justify separate treatment. But now that she's admitted, they say there are cultural differences which mandate separate treatment.'" Justice Department hopes second cut saves cadet's hair, Washington Times (Aug. 6, 1994) (emphasis added). *Cf. Kelly v. Johnson,* 425 U.S. 238 (1976) (upholding grooming standards for police departments); *Campbell v. Beaughler,* 519 F.2d 1307 (9th Cir. 1975), *United States v. Young,* 1 M.J. 433 (CMA 1976) (rejecting male servicemembers' claim that it violated the Constitution to require them, but not female servicemembers, to have short hair).

[19] *Army Regulation 670-1* at 12 (cosmetics and jewelry) and 18 (handbags and purses authorized only for female soldiers).

[20] The Naval Reserve Association's *EXCOM BULLETIN*, December 1994, reported: "Ship modifications costs for the Women at Sea Program are estimated to be $200 million or more. The estimated cost to modify the carrier Nimitz alone is $2.6 million. The newer carriers . . . that have not previously had . . . berthing modifications could cost as much as $6 million each. The carrier Lincoln cost $1.9 million in 1994."

Memorandum from the Secretary of Defense, Subject: Direct Ground Combat Definition and Assignment Rule (Jan. 13, 1994).

The point is clear: for purposes of determining the judicial necessity for strict scrutiny in regard to sex-based classifications, *either the law brooks no differential treatment between men and women or it brooks some.* If it brooks some---and even the Government concedes, and urges on this Court, that it does---then intermediate scrutiny for sex-based classifications remains not only appropriate wholly, but necessary absolutely.

Indeed, it is apparent the Government seeks only the intellectual solace of claiming strict scrutiny for sex-based classifications. Demonstrably, the result it urges, *in fact*, is no more and no less than the result under the intermediate standard of review which, even under the Government's theory, provides a consistent, coherent analytical framework in which to resolve *both* the issue of whether women must be admitted to VMI and the inherent issue of whether it is permissible to accommodate them if they are admitted. Another approach, which is neither consistent nor coherent, cannot be commended to the law.

B. The relationship between the principle of strict scrutiny and the principle of deference to military personnel decisions.

In frank terms, the Government's attempt, in a footnote, to preserve the military's prerogative to make the common sense distinctions now permitted, without fanfare, under intermediate scrutiny is a dodge in the first degree. As a matter of principle and philosophy, the searching judicial inquiry required by strict scrutiny *cannot* avoid diminishing

the scope of judicial deference to military policy choices traditionally required under the law. Rather, strict scrutiny of sex-based classifications would reduce that judicial deference to a very thin reed indeed. And it would be this thin reed upon which would rest "our entire constitutional system." *Gilligan,* 413 U.S. at 10.

The plain fact of the matter is strict scrutiny for classifications based on sex would require a compelling governmental reason *each time* men and women are treated differently. Since, particularly in the military, such policy choices range from the sublime to the minute, courts quickly would find themselves drawn in to the very task this Court admonished the Judiciary not to do. As the Court pointed out succinctly in *Orloff v. Willoughby,* "judges are not given the task of running the army."[21] *Orloff v. Willoughby,* 345 U.S. 83, 93 (1953).

While practical reasons for judicial deference to military policy-making often are advanced and relied upon, the principle of deference is more, and more important, than a recognition of the practical reality that "it is difficult to conceive of an area of governmental activity in which the

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[21] The question before the Court in this case is whether, through the imposition of strict scrutiny, the Constitution *requires* the Judicial Branch to demand the armed forces provide a compelling reason---moreover, as the Government advocates, Br. for Pet. at 44, a compelling reason narrowly tailored to each individual woman---for its policy choices. Manifestly, since "strict scrutiny" means what the Government says it does, that the military must prove a compelling reason why a particular woman was not enlisted as a Multiple Launch Rocket System/Lance Operations/Fire Direction Specialist, manifestly, upon imposition of strict scrutiny, "judges [would be] running the army." *Orloff,* 345 U.S. at 93; *cf.* note 9, and accompanying text, with notes 10-20, and accompanying text, *supra.*

courts have less competence" than military affairs. *Rostker v. Goldberg*, 453 U.S. 57, 65 (1981). Rather, deference is required by the Constitution itself.[22] *Id.* at 67. Indeed, deference is a critical component of the Constitution's separation of powers among the coordinate branches of government. As the Court strongly has counseled, *because* the military is under the exclusive constitutional control of the Legislative Branch, deference to military judgment "*underlies*

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[22] The Founding Fathers' decision to commit the armed forces, through their elected representatives, to the control of the people concurs with the theories of Clausewitz in his military classic, *On War*. Whether the question is battle plans or personnel policies, Clausewitz observed that "the task for the military theorist . . . is to develop a theory that maintains a balance among the trinity of war---the *people*, the *government*, and the *[military]*. A theory that ignores any one of them or seeks to fix an arbitrary relationship between them would conflict with reality to such an extent that for this reason alone it would be totally useless." Summers, *On Strategy: A Critical Analysis of the Viet Nam War* (1984) at 36-37.

Thus, in striking that trinitarian balance, force composition and deployment decisions must factor in physical and other practical requirements, as well as recruiting and retention factors, especially in regard to an all-volunteer force, political factors, and even make "rough accommodations" regarding the remarkable dynamics of sexuality and human nature.

These realities are not blithely glossed over. *See, e.g., Commission* at Finding 4.22 (*re:* Moskos Survey, Table 7 (33% of female servicemembers surveyed said they "definitely would leave" the armed forces if women were compelled to serve in direct combat; another % said they "probably would leave" and 7% were "not sure" how such a change would impact their desire to remain in service; only 14 said they "definitely" would remain in service)); *Pregnancy, romance problems for carriers,* Florida Times-Union (March 19, 1995) ("last year the *Eisenhower* became the Navy's first carrier with women as permanent crew members; 415 now serve among the [4,967-member crew]". . . . 38 *Ike* sailors became pregnant since the crew first went aboard nine months ago; 14 pregnancies occurred in the first six months at sea).

our entire constitutional system."[23] *Gilligan,* 413 U.S. at 10.

The predicate for the rational basis test---the practical reality that makes this deferential standard appropriate and workable---is the fact, to use equal protection terminology, that in the vast majority of policy choices there is no reason to "suspect" the choice was illicit. Indeed, this Court has held that a general rule that took a less flexible approach to determining statutory validity would vitiate "the principle that the Fourteenth Amendment gives the federal courts no power to impose upon the States their view of what constitutes wise . . . social policy." *Dallas v. Stanglin,* 490 U.S. 19, 27 (1989).

Strict scrutiny, manifestly, is the diametric opposite of rational basis review. Only the most compelling reasons, narrowly tailored, are sufficient to support the legislative choice. As a practical matter, the imposition of strict scrutiny reflects a policy judgment that the reasons for the legislative classification *rarely* will be sufficient. In other words, the imposition of strict scrutiny for sex-based classifications *presupposes* that such classifications "*seldom* [are] relevant to the achievement of any legitimate state interest." *Cleburne,* 473 U.S. at 440 (emphasis added).

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[23] The constitutional scheme which placed the raising and regulation of the armed forces under the exclusive control of the Legislative Branch was no accident. As one military analyst has noted, "*The Federalist Papers* clearly show . . . the Founding Fathers deliberately rejected the idea of an 18th century-type Army answerable only to the Executive. They wrote into the Constitution specific safeguards to ensure the people's control of the military." Summers, *supra* note 22 at 37. This constitutional commitment of the armed forces to the people's control is vouchsafed by the important principle of judicial deference.

Intermediate scrutiny, which this Court has accorded to sex,[24] reflects the practical reality, based on cognizable differences between men and women, that ordinarily those differences between men and women may be reflected in policy choices, but that there exists a somewhat greater-than-usual potential that sex-based distinctions may not be rational.

In other words, intermediate scrutiny strikes a judicious balance between the role of the courts in administering constitutional parameters and the need to give policy-makers appropriate leeway---in widely-ranging factual settings---to account for the fact of life that men and women have certain differences that must be addressed, and sometimes protected, separately under the law. Thus, while intermediate scrutiny recognizes that *sometimes it is rational* to make policy distinctions based on sex, strict scrutiny, at least if applied coherently, *must state that such distinctions seldom (indeed, in point of fact, never) are rational.*[25] *Otherwise---and as*

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[24] Quasi-suspect classification, and hence intermediate scrutiny, also has been accorded to illegitimacy. *Lalli v. Lalli*, 439 U.S. 259, 265 (1978).

[25] In 1976, this Court first announced that laws making distinctions based on sex would be judged by intermediate, or heightened, scrutiny. Such a classification cannot withstand constitutional challenge unless it "is substantially related to the achievement of an important governmental objective." *Craig v. Boren*, 429 U.S. 190, 197 (1976). Since *Craig*, this Court consistently has used the intermediate standard of review for sex-based classifications, applying it or explaining it in at least 17 different decisions in the past 20 years. *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. ___ (1994); *Clark v. Jeter*, 486 U.S. 456, 461 (1988); *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 459 (1988); *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 723-724, & n.9 (1982); *Plyer v. Doe*, 457 U.S. 202, 217 n.16 (1982); *Mills v. Habluetzel*, 456 U.S. 91, 101, & n.8 (91982); *Rostker v. Goldberg*, 453 U.S. 57, 87

demonstrated in the instant case---the expanded role of the judiciary in reviewing those policy choices plainly is unwarranted.[26]

II. The impact of strict scrutiny on presently settled questions of federal law counsels strongly against eliminating the well-established standard of intermediate scrutiny.

As demonstrated above, the enormity of the question the Government puts to the Court is too great to be disposed of in a footnote hailing judicial deference to considered military judgment. Moreover, the enormity of the question is too great to be addressed without considering its judicial and public policy consequences well beyond the impact of strict scrutiny for sex-based classifications on the armed forces.

By asking this Court to declare sex is a suspect classification, it is not too strong to state that the Government urges the addition of an Equal Rights Amendment to the Constitution by judicial fiat. The need for an Equal Rights Amendment, however, has been asked and answered, in the forum for such questions designated by the Constitution, and

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(1981); *Kirchberg v. Feenstra*, 450 U.S. 455, 459 (1981); *Wengler v. Druggists Mutual Ins. Co.*, 466 U.S. 142, 150 (1980); *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 286 (1979); *Davis v. Passman*, 442 U.S. 228, 234 (1979); *Califano v. Westcott*, 443 U.S. 76, 85 (1979); *Caban v. Mohammed*, 441 U.S. 380, 388 (1979); *Orr v. Orr*, 440 U.S. 268, 279 (1979); *Califano v. Webster*, 430 U.S. 313, 316-317 (1977); and, *Califano v. Goldfarb*, 430 U.S. 199, 210-211 (1977).

[26] To highlight the different (and, heretofore, legally cognizable) considerations that underlie classifications based on sex, one need only substitute a racial minority for women in existing policy choices. *See, e.g.*, policy choices set out at notes 8, 10-21 and accompanying text.

the nation's answer, at least for now, was "no." The nation debated that issue during the 1970's and early 1980's, and decided not to ratify the proposed Equal Rights Amendment (ERA) to the Constitution.[27]

During that time, many states adopted state constitutional versions of the ERA proposed for the federal constitution. The experiences of the 17 state ERAs give some indication of what might happen if this Court declared sex a suspect class.[28]

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[27] Congress proposed the ERA to the states on March 22, 1972. State legislatures quickly ratified the amendment, but the ratification effort soon ground to a halt. By the end of February 1974, 33 of the necessary 38 states had ratified the ERA. Only one state ratified the ERA in 1975, none did in 1976, and the last state to ratify the ERA, Indiana, did so in January 1977. Congress extended the ERA's deadline for ratification from March 22, 1979 until June 30, 1982. No states ratified the ERA during that time. During the original seven year deadline, five states that had ratified the ERA rescinded their ratifications (Idaho, Kentucky, Nebraska, South Dakota and Tennessee). The states of Idaho and Arizona filed suit in federal court in Idaho, seeking a declaration that states had the power to rescind their ratification of proposed amendments, and that Congress lacked the authority to extend the ratification deadline. The federal district court ruled the rescissions were valid and that Congress had no power to extend the deadline. *Idaho v. Freeman*, 529 F.Supp. 1107 (D.Idaho 1981). This Court dismissed the appeal as moot. *NOW v. Idaho*, 459 U.S. 809 (1982).

[28] The seventeen states with ERAs in their state constitutions are Alaska, Art. I, §3 (1972); Colorado, Art. 2, §29 (1972); Connecticut (Art. I, §20 (1974); Hawaii, Art. I, §3 (1972); Illinois, Art. I, §18 (1971); Louisiana, Art. I, §3 (1974); Maryland, Art. 46 (1972); Massachusetts, Part I, Art. 1 (1976); Montana, Art. 2, §4 (1973); New Hampshire, Part I, Art. 2 (1975); New Mexico, Art. II, §18 (1973); Pennsylvania, Art. I, §28 (1971); Texas, Art. I, §3a (1972); Utah, Art. 4, §1 (1896); Virginia, Art. I, §11 (1971); Washington, Art. 31, §1 (1972) and Wyoming, Art. I, §3 (1896). No state has added an ERA to its state constitution since 1976.

Family Law

Family law has been the greatest area of litigation under the state ERAs.[29] Ironically, the typical ERA family law case consisted of a man challenging a law that made a sex-based obligation on men to provide for women (e.g., fathers must support their families, divorced fathers must pay child support or alimony to their families, etc.).[30] The American Law Reports commented on this phenomenon, saying:

> In application, however, men often seem to have benefited more than women from the state ERA provisions, especially as concerns family matters. This has resulted in women losing some of the special protections they previously enjoyed.[31]

For example, a Maryland law that made it a crime for a husband not to support his wife was declared unconstitutional under the state ERA. The court ruled that such sex-based legal distinctions were now prohibited.[32] Child support becomes a joint responsibility of both parents, not just the

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[29] *See* 90 A.L.R.3d 158, "*Construction and Application of State Equal Rights Amendments Forbidding the Determination of Rights Based on Sex.*"

[30] *See "Equal Rights Provisions: The Experience Under State Constitutions,"* 65 Calif. L.R. 1086, 1106-7 (1977).

[31] 90 A.L.R.3d at 168.

[32] *Coleman v. Maryland,* 37 Md.App. 322, 377 A.2d 553 (1977).

fathers, under various state ERA cases.[33] The state legislatures have responded by passing new versions of these laws that are sex-neutral.

Employment Discrimination Against Women

State ERAs have not been used much to battle employment discrimination against women because of the state action issue. Because private employers are not part of the government, the state ERA does not affect their employment practices. Generally, women use federal and state civil rights statutes to bring employment discrimination claims, not state ERAs.

The Equal Protection Clause has the same state action requirement. "[T]he guarantees of free speech and equal protection guard only against encroachment by the government and 'erec[t] no shield against merely private conduct." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, ___ U.S. ___, 132 L.Ed.2d 487, 499 (1995), quoting *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948). Therefore, if this Court interprets the Equal Protection Clause to protect sex as a suspect class, that decision will only affect employment issues in the context of government employees, not private businesses.[34]

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[33] *Conway v. Dana*, 456 Pa. 536, 318 A.2d 324 (1974); *Cooper v. Cooper*, 513 S.W.2d 229 (Tex.Civ.App. 1974) and *Kemp v. Kemp*, 287 Md. 165, 411 A.2d 1028 (1980).

[34] In one of the few employment discrimination cases brought under a state ERA, a Texas court upheld a city ordinance that set up separate jobs named "policeman" and "policewoman," because the duties of the two jobs were different. *Turner v. City of Baytown*, 516 S.W.2d 270 (Tex.Civ.App. 1974).

Girls' Athletics

The state ERA cases concerning high school girls' athletics show the same philosophical dilemmas involved in accommodating women in the armed forces. Does one advocate total integration of boys and girls on athletic teams, to promote full equality? Or does one recognize that girls in general do not have the same physical abilities of boys, so girls and boys should have separate teams, so that girls will not be sitting on the bench while boys play in the first string positions on integrated teams? Also, does the constitutional standard apply differently to contact sports than non-contact sports? Does it promote equality to have a boy wrestling on a mat with a girl?

The state courts have come down on both sides of these questions. The Massachusetts Supreme Judicial Court ruled unconstitutional female-only teams, because the state ERA demands total equality.[35] An Illinois court upheld female-only teams, saying that women needed separate athletic teams in order to have actual equality of athletic opportunity.[36] These matters could become federal constitutional questions if this Court declares sex to be a suspect class.

Homosexual Marriage

The Hawaii Supreme Court used its state ERA to apply strict scrutiny to the state marriage laws, ruling that the state must demonstrate at trial a compelling state interest to justify

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[35] *Attorney General v. Massachusetts Interscholastic Athletic Association*, 393 N.E.2d 284 (Mass. 1979)

[36] *Petrie v. Illinois State High School Association*, 75 Ill.App.3d 980, 394 N.E.2d 855 (1979).

its requirement that only one man and one woman can marry. In *Baehr v. Lewin*, 74 Hawaii 645, 852 P.2d 44 (1993), the Hawaii Supreme Court applied the state ERA, which it said is "substantially identical with the proposed Equal Rights Amendment of the United States Constitution," *Baehr*, 852 P.2d at 65. That court ruled that the Hawaii marriage statute contained a sex-based classification, because a man is legally disabled from marrying another man because of his sex. The Hawaii Supreme Court drew a parallel between sex and race, and pointed to Court's decision in *Loving v. Virginia*, 388 U.S. 1 (1967). If the state cannot limit who can get married due to their race, and race is a suspect class, then the state cannot limit who can get married because of their sex, because sex is a suspect class under the state ERA. *Baehr*, 852 P.2d at 61-63. In the eyes of the Hawaii Supreme Court, to prohibit same-sex marriages is the constitutional equivalent of banning interracial marriages.

The Hawaii Supreme Court reviewed a decision by the Washington Court of Appeals rejecting the argument that the Washington state marriage law contained sex classifications that violated the state ERA, preventing two homosexual males from getting married. The two homosexual men had challenged the state marriage law that limited marriage to opposite sex partners and argued that the law violated the state ERA. The Washington Court of Appeals rejected that argument, saying that two men or two women could not meet the basic definition of marriage as one man and one woman. *See Singer v. Hara,* 11 Wash.App. 247, 522 P.2d 1187 (1974). The Hawaii Supreme Court criticized this reasoning as "tortured and conclusory sophistry." *Baehr*, 852 P.2d at 63.

The Hawaii Supreme Court remanded the case for trial to see if the state could demonstrate a compelling state interest

in limiting marriage to opposite-sex partners. The Hawaii Supreme Court said:

> On remand, in accordance with the "strict scrutiny" standard, the burden will rest on [the state] to overcome the presumption that [the Hawaii marriage statute] is unconstitutional by demonstrating that it furthers compelling state interests and is narrowly drawn to avoid unnecessary abridgements of constitutional rights.

Baehr, 852 P.2d at 68. Commentators have clamored to support the idea that laws limiting marriage to one man and one woman are an unconstitutional sex-based classification, deserving review under strict scrutiny.[37] If this Court declares sex to be a suspect class under the Equal Protection Clause, there could be federal constitutional challenges to the other 49 state laws that limit marriage to one man and one woman.

Abortion and Abortion Funding

This Court could inadvertently reopen the abortion issue by declaring sex to be a suspect class. Although this Court said there is no constitutional right to government funding of abortions in such cases as *Maher v. Roe*, 432 U.S. 464 (1977)

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[37] *See, e.g., "Same-Sex Marriage,"* 10 New York Law School Journal 555 (Spring, 1993); *"The Legality of Homosexual Marriage,"* 82 Yale L.J. 573, 588 (1973); *"The Texas Equal Rights Amendment in the Courts, 1972-77: A Review and Proposed Principles of Interpretation,"* 15 Houston L.R. 537, 628 (1978); *"Marriage Rights: Homosexuals and Transsexuals,"* 8 Akron L.R. 369, 373 (1975); *"Same Sex Marriages and the Constitution,"* 6 U.C.-Davis L.R. 275, 292 (1973) and *"The State Equal Rights Amendments and Their Impact on Domestic Relations Law,"* 11 Family Law Quarterly 101, 115 (1977).

and *Harris v. McRae*, 448 U.S. 297 (1980), this contentious issue might very well return to federal court because litigants in various states have argued that their states' ERAs compel government funding of abortions.

In *Doe v. Maher*, 515 A.2d 134 (Conn.Super. 1986), a Connecticut court ordered state funding of Medicaid abortions because of the state ERA. Because only women can get pregnant and have abortions, the court reasoned, then it violates the state ERA not to fund their abortions:

> Since only women become pregnant, discrimination against pregnancy by not funding abortion when it is medically necessary and when all other medical expenses are paid by the state for both men and women is sex oriented discrimination.

Maher, 515 A.2d at 159. The Connecticut court ruled that the state ERA required the law to be examined by "strict scrutiny." This is the standard the Solicitor General urges this Court to adopt.[38]

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[38] Pennsylvania courts also addressed the issue of whether the state ERA mandates government funding of abortions for poor women. An intermediate appellate judge ruled that the ERA did indeed require state funding of abortions. *Fischer v. Department of Public Welfare*, 482 A.2d 1137 (Pa.Cmwlth. 1984). The full appellate court reversed, *Fischer v. Department of Public Welfare*, 482 A.2d 1148 (Pa.Cmwlth. 1984). The Pennsylvania Supreme Court agreed that the state ERA does not mandate government funding. *Fischer v. Department of Public Welfare*, 509 Pa. 293, 502 A.2d 114 (1984).

Additionally, the Massachusetts Supreme Judicial Court ruled that the state government must pay for abortions for poor women. *Moe v. Secretary of Administration*, 382 Mass. 629, 417 N.E.2d 387 (1981). Although the plaintiffs argued that the state ERA required the state to pay

Commentators have sounded a similar theme by urging this Court to declare sex a suspect class, and then root the right to abortion in the Equal Protection Clause, rather than the right to privacy. For example, one commentator said:

> *Roe v. Wade* and *Doe v. Bolton*, the 1973 abortion decisions, for example, barely mention women's rights. They are not tied to equal protection or equal rights theory.... A broader frame for these decisions might have made it more difficult for the Court to rule, as it did stunningly in June 1977, that neither the Constitution nor federal statute requires Medicaid reimbursement for elective abortions.

Ruth Bader Ginsburg, *Sex Equality and the Constitution: The State of the Art*, 14 Women's Rights Law Reporter 361, 362 (Spring/Fall 1992).

Plainly, this Court will be forced to revisit the abortion funding decisions if this Court declares sex to be a suspect class. This Court may also be opening up the entire abortion controversy again and jeopardizing this Court's decision in *Planned Parenthood v. Casey*, ___ U.S. ___, 120 L.Ed.2d 674 (1992). In that case, this Court said state regulations on abortion are unconstitutional only if they impose an "undue burden" on that right. *Casey*, 120 L.Ed.2d at 715. The joint opinion of O'Connor, Kennedy and Souter then upheld many provisions of the law, such as the informed consent provision,

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for abortions, the Massachusetts high court declined to rule on the ERA argument and instead granted relief under another provision of the state constitution. 417 N.E.2d at 397.

the parental consent portion and the 24-hour waiting period for obtaining an abortion. *Casey*, 120 L.Ed.2d at 716-730.

But all of this could be reopened if the Court declares sex to be a suspect class. As Justice Blackmun said in his opinion in *Casey:*

> Our precedents and the joint opinion's principles require us to subject all non-de minimis abortion regulations to strict scrutiny. Under this standard, the Pennsylvania statute's provisions requiring content-based counseling, a 24-hour delay, informed parental consent, and reporting of abortion-related information must be invalidated.

Casey, 120 L.Ed.2d at 747. The only way to avoid reopening the abortion issue is for the Court to refuse to rule that sex is a suspect class.

CONCLUSION

This Court should not depart from the well-established standard of intermediate scrutiny to decide this case for VMI.

Date: December 15, 1995

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APPENDIX

Appendix

List of Amici Curiae

The Center for Military Readiness (CMR) - The Center for Military Readiness is a 501(c)(3) public policy organization specializing in military personnel issues. CMR supporters in all fifty states and on military bases around the world include approximately equal numbers of active duty and retired military people of all ranks and branches of the service, plus civilians who advocate a strong national defense and sound personnel policies that enhance morale, unit strength and overall readiness.

Family Research Council - Family Research Council is an independent, non-profit advocacy group dedicated to ensuring that the interests of the family are considered and respected in the formation of public policy. In 1995, the Family Research Council organized the Military Readiness Project, to participate in decisions made about the military, because the armed forces play an influential role in our national life. Family Research Council was founded in 1981 and is headquartered in Washington, D.C.

Minnesota Family Council - The Minnesota Family Council is Minnesota's largest nonprofit, nonpartisan, profamily organization. Established in 1983, the Minnesota Family Council addresses a wide array of issues affecting the family though the media, the legislative and legal system and by a statewide newspaper called the Profamily News. The Minnesota Family Council is based in Minneapolis.

Concerned Women for America - Concerned Women for America is national, nonprofit organization representing approximately 600,000 people. The purpose of CWA is to

preserve, protect, and promote traditional and Judeo-Christian values through education, legal defense, legislative programs, humanitarian aid and related activities. CWA was founded in 1979 and is headquartered in Washington, D.C.

Madison Project - The Madison Project is a membership organization designed to promote conservative public policy, and the election of social and economic conservatives to public office. The organization is named after James Madison who was not only a great Virginian, but authored the Constitution in the spirit of individual freedom and limited government. The Madison Project will focus on Constitutional liberty, traditional values and economic common sense, and will work to recruit candidates, train grassroots workers, and promote public policy consistent with those views. The Madison Project is based in Purcellville, Virginia.

Eagle Forum - Eagle Forum is a conservative, profamily organization of volunteers engaged in public policy making. We have chapters in all 50 states and are concerned particularly with legislation and policies affecting the family and gender relationships. Eagle Forum is based in Alton, Illinois.

Free Congress Foundation -- Free Congress Foundation is a non-profit foundation that seeks to advance fundamental principles of judicial restraint and the rule of law. Among these is consistent application of traditional rules of constitutional interpretation. The proper role for courts is settlement of legal disputes by faithful application of the law to the facts of particular cases. Only then can social policy develop as it should. Free Congress Foundation is based in Washington, D.C.

Northstar Legal Center -- The Northstar Legal Center is a division of the Minnesota Family Council. Its mission is to promote traditional values and constitutional freedoms in the legal arena. The Northstar Legal Center is based in Minneapolis.